FILE COPY

MAR 11

CHARLES E...

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 787

SOUTHERN RAILWAY COMPANY, and SOUTHERN RAILWAY-CAROLINA DIVISION, *Petitioners*,

v.

MARY ELIZABETH DANTZLER, AS ADMINISTRATRIX OF THE ESTATE OF LAWRENCE KEITT DANTZLER, Deceased, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA, AND BRIEF IN SUPPORT THEREOF.

SIDNEY S. ALDERMAN,
H. O'B. COOPER,
FRANK G. TOMPKINS,
J. E. HARLEY,
Attorneys for Petitioners.

S. R. PRINCE,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

TABLE OF CONTENTS.

	Page
Petition for writ of certiorari	1
Summary statement of matters involved	2
Reference to cognate case involving conductor's death	3
Brief history of this case	4
The evidence and grounds of negligence asserted	6
Reasons relied on for the allowance of the writ	15
Brief in support of petition for writ of certiorari	18
The opinion of the court below	18
Jurisdiction	18
Statement of the case	19
Specification of errors	19
Argument	21
I. Entire evidence insufficient to prove actionable negligence of petitioners or that it was proximate cause of the death; sole, efficient, proximate cause was intestate's own negligence	21
Theories upon which court below sustained recovery	24
Meaning of dropping the semaphore	26
Treating the order as a 3-copy, instead of a 5-copy, order	33
Failure to deliver additional verbal instructions to same effect as written order	36
Intestate's negligent violation of meet order the sole proximate cause of his death. The recovery cannot be sustained under Federal decisions	38
II. Evidence shows the intestate voluntarily exposed himself to risks so open and obvious that no ordinarily prudent man would have continued to face them, and he assumed the risk of his death	52
III. The court below misinterpreted the Act in upholding recovery of substantial damages in absence of proof of what pecuniary assistance or support the named beneficiaries might reasonably have expected to receive from the deceased employee had he lived	55
Conclusion	59

TABLE OF CASES.

Atchison, T. & S. F. R. Co. v. Saxon, October Term, 1931, Dec. Feb. 15, 1932, 284 U. S. —	15, 19, 21
Atchison, T. & S. F. R. Co. v. Toops, 281 U. S. 351	15, 19, 38
Atlantic C. L. R. Co. v. Southwell, 275 U. S. 64	16, 52

	Page
Boldt v. Pennsylvania R. Co., 245 U. S. 441	16, 52
Bradley v. Northwestern R. Co., 44 F. (2d) 683	15, 50
Brady v. Oregon Lumber Co. (Ore.), 243 Pac. 96	40
Chesapeake & O. R. Co. v. De Atley, 241 U. S. 310	16, 53
Chesapeake & O. R. Co. v. De Atley, 159 Ky. 687, 167 S. W. 933.	16, 54
Chesapeake & O. R. Co. v. Nixon, 271 U. S. 218	16, 19, 52
Chesapeake & O. R. Co. v. Stapleton, 279 U. S. 587	19
Chi., R. I. & P. R. Co. v. Coogan, 271 U. S. 472	19
Chi., R. I. & P. R. Co. v. Ward, 252 U. S. 18	16, 53
Dantzler, Admx. v. Southern Ry. Co., et al., 152 S. C. 287, 149 S. E. 750	5, 24
Davis v. Kennedy, 266 U. S. 147	15, 19, 25, 49
Davis v. Payne (Ore.), 216 Pac. 185, certiorari denied, 263 U. S. 720	15, 46
Frese v. Chi., B. & Q. R. Co., 263 U. S. 1	15, 19, 45, 49
Great Northern R. Co. v. Wiles, 240 U. S. 444	15, 43, 44
Gulf, C. & S. F. R. Co. v. McGinnis, 228 U. S. 173	16, 56
McDonald v. Great Northern R. Co. (Minn.), 207 N. W. 194	15, 49
Michigan Central R. Co. v. Vreeland, 227 U. S. 59	16, 55
Missouri Pacific R. Co. v. David, October Term, 1931, Dec. Feb. 15, 1932, 284 U. S. ——	16, 52
Nashville, C. & St. L. R. Co. v. Anderson, 134 Tenn. 666, 185 S. W. 677	16, 58
Paster v. Pennsylvania R. Co., 43 F. (2d) 908	15, 50
Pryor v. Williams, 254 U. S. 43	16, 53
St. Louis & S. F. R. Co. v. Mills, 271 U. S. 344	16, 52
Seaboard A. L. Ry. v. Horton, 233 U. S. 492	16, 52, 53
Southern R. Co. v. Hylton, 37 F. (2d) 843	15, 50
Toledo, St. L. & W. R. Co. v. Allen, 276 U. S. 165	16, 19, 52
Unadilla Valley R. Co. v. Caldine, 278 U. S. 139	15, 19, 26, 35, 40, 42
Unadilla Valley R. Co. v. Dibble, 31 F (2d) 239, certiorari denied, 280 U. S. 565	15, 42
Virginian R. Co. v. Linkous, 230 Fed. 88, certiorari denied, 242 U. S. 630	15, 44, 46
Yadkin R. Co. v. Sigmon, 267 U. S. 577, reversing 186 N. C. 519.	15, 19, 49
Youngblood, Admx v. Southern Ry. Co., et al., 137 S. C. 47, 134 S. E. 660	3, 4, 5, 6, 24, 25, 33, 35, 37
Youngblood, Admx. v. Southern Ry. Co., et al., 152 S. C. 265, 149 S. E. 742	5, 24, 26
22 R. C. L. 110, 111, 112	39

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No.

SOUTHERN RAILWAY COMPANY, and SOUTHERN RAILWAY-CAROLINA DIVISION, *Petitioners,*

v.

MARY ELIZABETH DANTZLER, AS ADMINISTRATRIX OF THE ESTATE OF LAWRENCE KEITT DANTZLER, Deceased, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA.

To the Honorable the Supreme Court of the United States:

Your petitioners, Southern Railway Company and Southern Railway-Carolina Division, pray this Court to review on writ of certiorari a judgment of the Supreme Court of South Carolina in the case of *Mary Elizabeth Dantzler, as Administratrix of the estate of Lawrence Keitt Dantzler, deceased, v. Southern Railway Company and Southern Railway-Carolina Division,* rendered on the 14th day of December, 1931, as shown by the opinion of that court (R. 187). Under the practice prevailing in

South Carolina, no final judgment, separate from the opinion of the Supreme Court, is rendered, and the opinion is the final judgment. The record has been reprinted in this Court and page references herein are to the record as printed for this Court.

I.

SUMMARY STATEMENT OF THE MATTERS INVOLVED.

This was an action by the plaintiff administratrix for damages for the alleged wrongful death of her intestate. It was brought, tried and decided under the Employers' Liability Act, 35 Stat. 65-66, 45 U. S. C. 51-59. It was alleged in the complaint and admitted in the answer (R. 2, 4) and it appears from the evidence without dispute (R. 9, 10, 11, 12, 169-172) that at the time of the fatal injury the intestate was employed and the railway companies were engaged in interstate commerce and transportation.

The judgment of the Supreme Court of South Carolina, sought to be reviewed, affirmed judgment for plaintiff administratrix on a verdict for $12,500.00, as damages for the alleged wrongful death of her intestate, employed by petitioners as engineer operating an extra train consisting of an engine and tender running light. He was killed in a head-on collision with a superior train, resulting from his own disobedience of a written meet order which had been duly furnished him, which had been read to him by his conductor, which he had in his possession, and which had been neither fulfilled, cancelled nor annulled. The collision occurred about 9:30 or 9:35 a.m. in a heavy fog, after intestate had driven his train past the ordered meeting point, Orangeburg, S. C., at 9:25 a.m., and had run three miles beyond, colliding with the opposing superior train on the main line just beyond Stilton.

The collision resulted also in the death of the conductor on intestate's engine and in the deaths of three members

of the unoffending superior train, the conductor, the engineer, and the fireman.

Reference to Cognate Case Involving Conductor's Death.

This is a cognate and companion case to that *of Mary O. Youngblood, as Administratrix of the estate of Cleveland J. Youngblood, deceased, v. Southern Railway Company and Southern Railway-Carolina Division,* in which petition for writ of certiorari to the Supreme Court of South Carclina is being filed by these petitioners in this Court contemporaneously with the present petition. Youngblood was the conductor of the same extra train of which Dantzler was the engineer, Youngblood being also killed in the collision. The Youngblood case was tried on substantially the same evidence as the present Dantzler case, though on a separate record. Each resulted in a verdict and judgment against petitioners in the same amount of $12,500.00.

The judgment in the Youngblood case was affirmed by the Supreme Court of South Carolina on the same day on which the opinion was rendered in this case. While the Supreme Court of South Carolina rendered a separate opinion affirming judgment for the respondent in each of these cases, the opinion in the present Dantzler case contains no discussion of the evidence, no statement of the theory on which the recovery was sustained, and merely refers to the opinion of the court in the Youngblood case. In the present case, the Supreme Court of South Carolina said (R. 188):

> "The questions presented by this appeal are the same as those involved in the Youngblood case. It is conceded that the evidence in the two cases is substantially the same. What we have said, therefore, in the Youngblood case, disposes of the questions here raised."

We refer to the cognate Youngblood case here because petitioners are coincidentally filing the record and a petition for certiorari and supporting brief with this Court in the Youngblood case also. That petition raises the same questions as the present petition and we suggest that this Court will probably desire to consider together the petitions in the two cognate cases.

With this in view, it is important to point out *in limine* that there is no allegation, charge or contention in the present case that any negligence on the part of Youngblood, the conductor, caused Dantzler's death. Similarly, there is no allegation, charge or contention of the plaintiff in the Youngblood case that any negligence on the part of Dantzler, the engineer, caused Youngblood's death. In neither case did the plaintiff charge any negligence on the part of any member of the innocent crew of the opposing train.

In each of the cases the judgment was recovered, and was affirmed by the Supreme Court below, solely on the theory that, notwithstanding the admitted negligence of the plaintiff's intestate which proximately caused his death, there was sufficient evidence to go to the jury that negligence of dispatchers and operators of petitioners contributed "in part" to the death.

In the present case, the theory for recovery is exactly the same as in the case of Youngblood, the conductor, except that in the present case there was no contention made on the record that there was any negligence on the part of petitioners in failing to deliver copies of the meet order to the superior train at some point prior to the meeting point. That contention had been made in the previously tried Youngblood case, but here it was abandoned, apparently, because so manifestly without merit.

Brief History of This Case.

As shown in the petition in the Youngblood case, there were three trials of that case in the state court. The first

trial resulted in a judgment for petitioners on a directed verdict, but on appeal the Supreme Court of South Carolina reversed that judgment and remanded for a new trial. See 137 S. C. 47, 134 S. E. 660. Two justices, Cothran and Purdy, dissented on the ground that verdict was properly directed against the plaintiff and in favor of defendants.

The present Dantzler case was not tried, after verdict was directed against the plaintiff in the Youngblood case and pending the determination of the appeal therefrom. For this reason the Supreme Court of South Carolina in the opinion in 137 S. C. 47 made no reference to the Dantzler case.

After the first Youngblood appeal was determined, reversing direction of verdict for the defendants, both cases were tried in the trial court, the Youngblood case resulting in a verdict and judgment for the plaintiff there in the amount of $35,000.00 and the Dantzler case resulting in a verdict and judgment for the plaintiff, respondent here, in the amount of $33,875.00. Both cases were appealed to the Supreme Court of South Carolina, and that court, in separate opinions, but handed down on the same day, September 25, 1929, reversed both cases for errors of law committed and remanded again for a new trial. Purdy, J., an acting justice, did not participate in these decisions, but Cothran, J., concurred in the reversal of the judgments but dissented from the granting of new trials, asserting that the cases should have been remanded for judgments in favor of defendants. See opinion in second Youngblood appeal, 152 S. C. 265, 149 S. E. 742, and in the first Dantzler appeal, 152 S. C. 287, 149 S. E. 750.

There were certain differences in the errors of law for which the two cases were reversed but on the question as to whether the trial court should have directed verdict for the defendants in the Dantzler case, the Supreme

Court, in its opinion, merely referred to its opinion on the same question in the Youngblood case, 152 S. C., at 293.

Thereafter, the two cases were tried at the same term of the trial court. (See both records, page 1.) Each resulted in verdict and judgment in favor of plaintiff, for $12,500.00. Each case was appealed to the Supreme Court of South Carolina, which affirmed both judgments by separate opinions, each rendered on December 14, 1931, the opinion in this case merely referring to the opinion in the cognate Youngblood case. It is that opinion and judgment of the Supreme Court of South Carolina, forming the judgment herein, which is sought to be reviewed by this petition. That opinion and judgment, not yet reported, rendered December 14, 1931, is in this record (R. 187). Cothran, J., did not sit, being ill.

As hereinafter shown in more detail in the supporting brief, the only light to be found in any of these opinions of the Supreme Court of South Carolina as to the theory upon which that court sustained recovery of damages for the wrongful deaths of Dantzler and Youngblood is to be found in the opinion on the first Youngblood appeal, 137 S. C. 47, 134 S. E. 660, since in the two subsequent Youngblood appeals that court disposed of the merits of that question merely by reference to its opinion on the first appeal, and in the opinion in the present case, it disposed of that question by reference to its opinion in the Youngblood case.

The Evidence and the Grounds of Negligence Asserted.

The evidence in the present case is substantially the same as in the cognate Youngblood case and is stated in the petition in that case and the supporting brief, but will be here restated, with references to the present Dantzler record and with references to certain different testimony in this case.

Petitioners own and operate, among other lines of rail-

road, a single track road between Charleston and Columbia, in South Carolina, through Branchville, Orangeburg, St. Matthews, Fort Motte, and Andrews, the freight yard near Columbia. In railroad terminology, trains on the Southern Railway running from Columbia to Charleston are considered eastbound trains, and from Charleston to Columbia westbound. On the morning of the accident the engine of a westbound freight train known as Extra 683 West became disabled at Fort Motte, a station on the Southern Railway west of Orangeburg (R. 9, 10). This freight train, Extra 683 West, contained 24 cars of interstate freight (R. 103, 169-171). Petitioners kept a switching or yard engine at Branchville, a junction point east of Orangeburg, and decided to send that engine, No. 483, west to relieve the disabled engine and carry the freight train on to Andrews, the freight yard near Columbia, the crew of this relief engine consisting of respondent's intestate as engineer, Youngblood as conductor, and Witherspoon as fireman (R. 9, 10, 48-49, 115, 124).

At the same time a freight train known as Extra 723 East was moving over the same line of road in an easterly direction from Columbia to Charleston (R. 11-12). As it was necessary for these two trains, Extra 483 West and Extra 723 East, to meet and pass each other at some point on the road, the train dispatcher at Charleston wrote out and sent the following telegraphic order to Branchville and Orangeburg:

> "Extra 723 East get this order and meet Extra 483 West at Orangeburg. Engine 483 run extra Branchville to Andrews."

This was known as a form "31" order, and its serial number was 18. A form "31" order has to be signed for by the conductor when delivered to him (R. 16-18, 100-101, 125). This order No. 18 was sent simultaneously to the Branchville and Orangeburg operators at 7:58 a. m.

(R. 17, 49). The dispatcher at Charleston testified (R. 49), and his train order book showed (R. 172), that this train order No. 18 as transmitted to Orangeburg was addressed to Extra 723 East and operator,—the words "and operator" in the address signifying that it was a 5-copy order, and that the operator at Orangeburg should make five copies of the order, one for his file and two copies to be delivered to the conductor of each train affected (R. 13-14, 145-146). However, the operator on duty at Orangeburg, T. E. Jones, testified that this order No. 18 as transmitted to him did not contain the words "and operator" in the address, but was addressed only to Extra 723 East, and hence he made but three copies of the order,—one for his file and two copies to be delivered to the conductor of the train addressed (R. 61). Shortly after this order was sent, Operator Jones at Orangeburg was relieved by Operator Tyson, and Jones turned over to his successor, Tyson, the three copies that he had made of this order No. 18 addressed only to Extra 723 East (R. 62-63). Under this arrangement the operator at Orangeburg had no copies of the order for delivery to the crew of Extra 483 West, as he would have had if the order had been received at Orangeburg as a 5-copy order (R. 70).

This train order No. 18 to the Branchville operator was transmitted and received addressed only to Engine 483 (R. 17-18, 50, 172), which meant that it was a 3-copy order (R. 14, 38, 41, 102), and hence the operator at Branchville made three copies of the order, one for his file, and delivered two copies to the conductor of Extra 483 at 8:31 a. m. (R. 100). The conductor, Youngblood, delivered one of these copies to respondent's intestate, and they read over the order in the presence of the fireman before their engine left Branchville (R. 112). The evidence is uncontradicted that there was nothing on the face of the train order delivered to respondent's intestate at Branchville indicating that he would be given additional copies of this

order, or any other order, at Orangeburg (R. 17, 19, 23. 50, 101, 126, 131, 133, 141).

While these two trains, Extra 483 West and Extra 723 East, were both extra trains, Extra 723, being eastbound, was the superior train by authority of the time-table direction (R. 19-21, 52-53, 74, 126, 173-174), and hence Extra 483 West was required to take the siding at the meeting point, as provided by rule No. 88 as follows (R. 175):

> "At meeting points between extra trains, the train in the inferior time-table direction must take the siding unless otherwise provided."

Also, rule No. 513 of petitioners' rule book is as follows (R. 182):

> "Approaching meeting points made by train order, the train to take siding may, after stopping, pass the stop signal immediately preceding the meeting point and proceed under control to the entrance switch of siding."

At 8:35 a. m. engine 483, then operated as a train, Extra 483 West, consisting of only the engine and tender, with Conductor Youngblood and Fireman Witherspoon riding in the cab of the engine with respondent's intestate, left Branchville and proceeded west toward Orangeburg (R. 100, 112). At Rowesville, a station eight or nine miles east of Orangeburg, the conductor of this train was handed an order to the effect that No. 12, engine 1055, which was the regular passenger train from Columbia to Branchville, would wait at packing house switch until 9:15 for Extra 483 West (R. 113). This packing house switch is located about three-fourths of a mile east of the station at Orangeburg (R. 117). Extra 483 West proceeded on to the packing house switch, where it took the siding and waited for the passenger train, No. 12, to pass (R. 113, 117). Extra 483 West then backed out on to the

main line and proceeded toward Orangeburg, and as it approached that station the semaphore was showing red or the stop signal against this train, and in response to four blasts of the whistle from Engineer Dantzler, the operator at Orangeburg dropped the semaphore board, indicating proceed or clear signal and signifying that he had no train orders for the crew of that train. (R. 67, 72, 75). The semaphore at Orangeburg is located in front of the operator's office and about 75 yards east of the east switch of the passing track, and a westbound train approaching Orangeburg would necessarily have to proceed past this semaphore in order to reach the entrance to the passing track (R. 24, 25, 65, 72, 107-108, 126). This passing track is nearly a mile long (R. 65, 72, 108).

The train dispatcher in Charleston testified that he called the operator at Orangeburg and inquired about Extra 483, and was told that it was coming; that "I told him to clear him, to tell him to go to the west end of the pass track and wait on Extra 723" (R. 43-44, 51). The dispatcher was anxious to get Extra 483 to Fort Motte as soon as possible (R. 43), and by waiting in the west end of the passing track instead of the east end, this train would, of course, be in position to make a more expeditious departure from Orangeburg after Extra 723 East had arrived. The operator at Orangeburg admitted this telephone conversation, but understood the directions to be "to clear Extra 483, and *let him go* to the west end of the pass track, etc." (R. 64, 69). This operator also testified that when he dropped the semaphore board he knew that the crew of Extra 483 West had in their possession the train order requiring them to meet Extra 723 East at Orangeburg, and that when this engine passed by the semaphore and his office he assumed that it was going up in the passing track to wait on Extra 723 (R. 72, 74).

There was testimony by plaintiff's witness Huggins, a man who had not been employed by a railroad company for eighteen years (R. 85-86) and who yet undertook to

qualify as an expert on new rules of Southern Railway Company adopted since he had worked for it, in which he undertook to assert that the act of the operator in dropping the semaphore board cleared plaintiff's intestate to proceed on the main line to the next telegraph station, regardless of his written meet order (R. 81, 87).

The testimony of this witness is so biased on its face, so manifestly overzealous to exculpate plaintiff's intestate and to aid a recovery against petitioners, so clearly in conflict with all of the other evidence in the case, so clearly contrary to the other evidence of respondent, and so clearly in conflict with the rules of the company in evidence, that it cannot be considered as substantial evidence to support a recovery.

The same witness undertook to contend argumentatively that there was negligence of petitioners in maintaining an unsafe arrangement of the passing track at the meeting point, in that the east end of the passing track was west of the semaphore board at Orangeburg and that hence in order to obey the meet order it was necessary for plaintiff's intestate to proceed past the board 75 yards in the territory of the opposing train before he could reach the passing track to obey the meet order (R. 98). There was no allegation in the complaint of any negligence in the arrangement of the passing track with reference to the semaphore board (R. 2-4), and, of course, plaintiff's intestate was perfectly familiar with the situation and had been operating over it for many years and certainly assumed any risk incident thereto (R. 6, 124). Besides, this contention could only have been pertinent if the collision had occurred within the 75 yards between the semaphore board and the nearest entrance to the passing track. In fact, the collision occurred three miles beyond (R. 122).

Extra 483 West proceeded past this semaphore and past the east switch of the passing track and on down the

main line to the west end of the passing track, where it stopped after another engine in the yards, No. 61, sounded one blast of the whistle, which was a cautionary signal (R. 121). As to what ensued, the undisputed testimony of the fireman, Witherspoon, is as follows (R. 114-115):

> "After we passed the semaphore, and was going up by the pass track switch another engine gave a blast of the whistle, which indicated stop, and Dantzler stopped at the west end of the pass track, and Youngblood got down and examined the switch, and we pulled up over the switch, and Youngblood came up and got on the engine. * * * I asked him if he did not intend to go back in there, and he said No, we have time to go to Stilton, and I went to work on my fire, and the next time I realized where we were we were going over the switch at Stilton, and I turned to him to ask if he was going in there, and at that time he hollowed out to me to get ready to jump, —we are going to hit."

Extra 483 West collided head-on with Extra 723 East at a point just west of Stilton, which is a small station about two miles west of Orangeburg (R. 122), this collision resulting in the deaths of respondent's intestate and Conductor Youngblood of the crew of Extra 483, and also in the deaths of the conductor, engineer and fireman of the crew of Extra 723 (R. 7, 105). Extra 483 arrived at Orangebourg, the meeting point, at 9:25 a. m., and the collision occurred about 9:35 (R. 46).

The testimony is uncontradicted that on the morning of the collision, after respondent's intestate had been taken to the hospital and when he knew that death was imminent, he stated to the witness J. C. Street, who was occupying another bed in the same room: "I met 723 on the main line, and I had a dead meet order with them at Orangeburg" (R. 147). The witness Street again asked respondent's intestate, "How came you all to do that?"

and Dantzler said, "I don't know,—I just forgot,—it is too late now, and I am just to blame for it." (R. 148). When he told Street "that he had a dead meet order to meet them at Orangeburg," he added, "and if you want to see them, get them out of the jumper pocket and read them." The witness Street got the meet order out of intestate's jumper (R. 153), and it was introduced in evidence (R. 172). In another version of the conversation, the witness Street said the following,. "I said who was with you? and he said 'Youngblood and Witherspoon. I think everybody's killed on both crews. It is all my fault. It is too late' " (R. 155).

And in the afternoon of the same day, respondent's intestate recognized Dr. J. S. Wimberly at the hospital and called him into his room. Dr. Wimberly had occasion to assist in administering to him throughout the afternoon and testified that during some conversation Engineer Dantzler "mentioned to me the cause of the wreck. He said he overlooked the orders, and met the 723 on the main line,—it is too late now. Those were his words" (R. 157).

The decedent, Dantzler, was 41 years of age at the time of his death, and left surviving him his widow, the respondent, also 41 years of age, and one child, John Lawrence Dantzler, age 16 years (R. 6). The intestate was paid the sum of $2,650.22 as wages for the year next preceding his death (R. 6). There was no testimony that the respondent and her child were dependent upon the intestate for support, or that he contributed any amount to their support. No testimony was offered as to the deceased's or his widow's expectancy of life, and no proof that the decedent's widow and child were deprived of any pecuniary assistance by his death.

It was admitted in the record that copies of the train order No. 18 delivered at Branchville to the conductor and engineer of Extra 483 were found upon their persons after the collision (R. 35, 99, 172).

The grounds of negligence alleged against petitioners (R. 2, 3) and submitted to the jury were: in not providing a safe and suitable place wherein and whereon the intestate employee could perform his work; in not providing safe and suitable appliances and instrumentalities with which the intestate employee could perform his duties; in failing to furnish safe and competent agents, officers and employees to direct the movements of the two trains; in furnishing unsafe and incompetent agents, officers and employees to direct the movements of the two trains; in failing to give proper orders for the movement of the two trains which were in collision; in giving wrong and improper orders for the movement of the two trains which were in collision; in not giving proper signals for the movements of the train on which the intestate employee was working; in giving wrong and improper signals for the movement of the train on which the intestate employee was working; and owing to the negligence of the agents, officers and employees in directing the movements of the two trains in collision.

At the close of all the evidence, petitioners moved for the direction of a verdict in their favor, which motion was overruled and exception taken thereto (R. 167-168). The State Supreme Court sustained the trial court's refusal to grant petitioners' motion for a directed verdict (R. 187-188, and pages 165-171 of record in companion Youngblood case). This holding of the Supreme Court of South Carolina, petitioners contend, was erroneous, and is assigned as error.

Judgment was rendered for respondent in the sum of $12,500.00 (R. 1), which judgment was affirmed by the Supreme Court of South Carolina on December 14, 1931, as shown by its opinion and judgment in the record (R. 187).

II.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The entire evidence herein is wholly insufficient to prove actionable negligence of the petitioners, or that such negligence was the proximate cause of intestate's death; the entire evidence shows that the sole, efficient, proximate cause of intestate's death was his own negligence in disobeying his meet order; and the judgment for respondent should have been reversed, and judgment for petitioners should have been entered, as matter of law under the Federal statute.

Atchison, T. & S. F. R. Co. v. Saxon, October Term, 1931, No. 291, decided Feb. 15, 1932, 284 U. S. —;
Atchison, T. & S. F. R. Co. v. Toops, 281 U. S. 351;
Unadilla Valley R. Co. v. Caldine, 278 U. S. 139;
Yadkin R. Co. v. Sigmon, 267 U. S. 577, reversing and remanding without opinion, 186 N. C. 519, 120 S. E. 56;
Davis v. Kennedy, 266 U. S. 147;
Frese v. Chi., B. & Q. R. Co., 263 U. S. 1;
Great Northern R. Co. v. Wiles, 240 U. S. 444;
Bradley v. Northwestern P. R. Co., 44 F. (2d) 683;
Paster v. Pennsylvania R. Co., 43 F. (2d) 908;
Southern R. Co. v. Hylton, 37 F. (2d) 843;
Unadilla Valley R. Co. v. Dibble, 31 F. (2d) 239; certiorari denied, 280 U. S. 565;
Virginian R. Co. v. Linkous, 230 Fed. 88, certiorari denied, 242 U. S. 630;
Davis v. Payne (Ore.), 216 Pac. 185, certiorari denied, 263 U. S. 720;
McDonald v. Great Northern R. Co. (Minn.), 207 N. W. 194.

2. The entire evidence herein shows that the intestate voluntarily exposed himself to risks and dangers so open and obvious that no ordinarily prudent man would have

continued to face them, and he assumed the risk of his death.

Missouri Pac. R. Co. v. David, No. 365, October Term, 1931, decided Feb. 15, 1932, 284 U. S. —;
Toledo, St. L. & W. R. Co. v. Allen, 276 U. S. 165;
Atlantic C. L. R. Co. v. Southwell, 275 U. S. 64;
St. L.-S. F. R. Co. v. Mills, 271 U. S. 344;
Chesapeake & Ohio R. Co. v. Nixon, 271 U. S. 218;
Pryor v. Williams, 254 U. S. 43;
Chi., R. I. & P. Ry. Co. v. Ward, 252 U. S. 18;
Boldt v. Pennsylvania R. Co., 245 U. S. 441;
Chesapeake & O. R. Co. v. De Atley, 241 U. S. 310;
Seaboard A. L. Ry. v. Horton, 233 U. S. 492;
Chesapeake & O. R. Co. v. De Atley, 159 Ky. 687, 167 S. W. 933, 935.

3. The Supreme Court of South Carolina misinterpreted the Federal Employers' Liability Act in upholding a recovery of substantial damages on the evidence, there being an entire absence of any proof as to what pecuniary assistance or support the named beneficiaries might reasonably have expected to receive from respondent's intestate had he lived.

Gulf, C. & S. F. R. Co. v. McGinnis, 228 U. S. 173;
Michigan Central R. Co. v. Vreeland, 227 U. S. 59;
Nashville, C. & St. L. R. Co. v. Anderson, 134 Tenn. 666, 185 S. W. 677.

WHEREFORE, because said decision and judgment of the Supreme Court of South Carolina decided the foregoing Federal questions erroneously and contrary to the decisions of this Court, your petitioners, upon this petition, upon the annexed brief, and upon a certified transcript of the record of all proceedings in the Supreme Court of South Carolina, pray that a writ of *certiorari* be issued, to the end that said cause may be reviewed and determined by this Court, as provided by law, and that upon

such review the said judgment of the Supreme Court of South Carolina be reversed.

SOUTHERN RAILWAY COMPANY, and
SOUTHERN RAILWAY-CAROLINA DIVISION,
By
SIDNEY S. ALDERMAN,
H. O'B. COOPER,
FRANK G. TOMPKINS,
J. E. HARLEY,
Attorneys for Petitioners.

S. R. PRINCE,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No.

SOUTHERN RAILWAY COMPANY, and SOUTHERN RAILWAY-CAROLINA DIVISION, *Petitioners,*

v.

MARY ELIZABETH DANTZLER, AS ADMINISTRATRIX OF THE ESTATE OF LAWRENCE KEITT DANTZLER, Deceased, *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I.

THE OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of South Carolina has not yet been officially reported. It will be found in the record beginning at page 187.

II.

JURISDICTION.

The date of the judgment sought to be reviewed is December 14, 1931.

The jurisdiction of this Court is invoked on the ground that petitioners, in the courts below, claimed immunity from liability and asserted rights under the Federal Employers' Liability Act, 45 U. S. C. 51-59, a statute of the United States, which claim and rights were denied, and that petitioners have not heretofore had opportunity to submit said claim and rights for adjudication to any Federal tribunal, jurisdiction being therefore invoked under Judicial Code, Section 237, as amended, 28 U. S. C. 344 (b).

Some of the cases believed to sustain the jurisdiction of this Court are:

Atchison, T. & S. F. Co. v. Saxon, decided Feb. 15, 1932, 284 U. S. —;
Atchison, T. & S. F. Co. v. Toops, 281 U. S. 351;
Chesapeake & Ohio R. Co. v. Stapleton, 279 U. S. 587;
Unadilla Valley R. Co. v. Caldine, 278 U. S. 139;
Toledo, St. L. & W. R. Co. v. Allen, 276 U. S. 165;
Chicago, M. & St. P. R. Co. v. Coogan, 271 U. S. 472;
Chesapeake & Ohio R. Co. v. Nixon, 271 U. S. 218;
Yadkin R. Co. v. Sigmon, 267 U. S. 577;
Davis v. Kennedy, 266 U. S. 147;
Frese v. Chi., B. & Q. R. Co., 263 U. S. 1.

III.

STATEMENT OF THE CASE.

The case is sufficiently stated in the accompanying petition, in which the relevant facts are fully stated. References to the facts will be made and repeated in the body of this brief only as may be necessary to discussion of the questions involved.

IV.

SPECIFICATION OF ERRORS.

The errors assigned and relied on by petitioners are the following:

1. That the Supreme Court of South Carolina erred in refusing to sustain and overruling petitioners' exceptions 1, (a), (c), and (d), as follows:

> Praying reversal of the verdict and judgment—
>
> "1. Because his Honor erred * * * in overruling the motion for direction of verdict in favor of defendants, upon the grounds:
>
> (a) That the only reasonable inference from the entire testimony is that the death of the plaintiff's intestate was caused solely by his own negligence and recklessness.
>
> * * * * * * * * *
>
> (c) That the only reasonable inference to be drawn from the entire testimony is that the proximate cause of the injuries resulting in the death of plaintiff's intestate was the intestate's own violation of a positive meet order which he had in his possession, not fulfilled, superseded or annulled.
>
> (d) That there is no evidence of actionable negligence on the part of the defendants.'" (R. 185)

2. That the Supreme Court of South Carolina erred in refusing to sustain and in overruling petitioners' exception 1, (b), as follows:

> Praying reversal of the verdict and judgment—
>
> "1. Because his honor erred * * * in overruling the motion for direction of verdict in favor of defendants, upon the grounds:
>
> * * * * * * * * *
>
> (b) That the entire testimony is susceptible of but one reasonable inference, namely, that the danger of the situation resulting in the death of plaintiff's intestate was so obvious that an ordinarily careful person would have observed and appreciated the same, and hence plaintiff's intestate assumed the risks thereof." (R. 185.)

3. That the Supreme Court of South Carolina erred in refusing to sustain and in overruling petitioners' exception 1, (e), as follows:

> Praying reversal of the verdict and judgment—
>
> "1. Because his honor erred * * * in overruling the motion for direction of verdict in favor of defendants upon the grounds:
>
> * * * * * * * * * *
>
> (e) That there is no evidence as to pecuniary loss sustained by the beneficiaries named in the complaint as the result of the death of plaintiff's intestate and hence no evidence upon which to base an award of damages." (R. 185.)

V.

ARGUMENT.

POINT I.

THE ENTIRE EVIDENCE HEREIN IS WHOLLY INSUFFICIENT TO PROVE ACTIONABLE NEGLIGENCE OF THE PETITIONERS, OR THAT SUCH NEGLIGENCE WAS THE PROXIMATE CAUSE OF INTESTATE'S DEATH; THE SOLE, EFFICIENT, PROXIMATE CAUSE OF INTESTATE'S DEATH WAS HIS OWN NEGLIGENCE; AND THE JUDGMENT FOR RESPONDENT SHOULD HAVE BEEN REVERSED, AND JUDGMENT FOR PETITIONERS SHOULD HAVE BEEN ENTERED, AS MATTER OF LAW UNDER THE FEDERAL STATUTE.

What was said by this Court in *Atchison, T. & S. F. R. Co. v. Saxon,* No. 291, October Term, 1931, decided Feb. 15, 1932, applies here:

> "The cause is one of a peculiar class where we have frequently been obliged to give special consideration

to the facts in order to protect interstate carriers against unwarranted judgments and enforce observance of the Liability Act as here interpreted."

The Supreme Court of South Carolina in this case has imposed on petitioners a liability, under the Federal Employers' Liability Act, in plain disregard of controlling Federal law as laid down and enforced in numerous recent decisions of this Court, for the death of an engineer killed in a collision caused by his own reckless disobedience of a positive meet order which he had and was bound to obey. His disobedience of the order also caused the deaths of three innocent members of the crew of the unoffending superior train collided with, thereby imposing clear liability on petitioners under the Act for those innocent deaths. Petitioners have paid the claims for these three deaths (Youngblood, R. 143). Yet the Act has been perverted to allow the administratrix of the employee, whose own disobedience of order and positive recklessness caused the disaster, to recover damages for his death.

Unless this Court grant this petition and give relief these interstate carriers have no protection against the unwarranted judgment and the Liability Act as interpreted by this Court has not been observed.

There is not here alleged in the complaint or relied upon to support the recovery any charge of negligence on the part of any other member of the crew of the intestate's train or on the part of any member of the crew of the opposing train. The sole support of the recovery is the alleged negligence of the dispatcher, and/or of the operator at the ordered meeting point, in the transmission and delivery of the order which the intestate admittedly received and disobeyed, and in failing to do certain additional things to remind him again of his order and thus seek to prevent his disobedience, and in signaling his train.

Succinctly stated, the question is this: When an en-

gineer running a light engine with tender as an inferior extra train under sole authority of a written order, delivered in duplicate at the start of the run to the conductor, who read the order to the engineer and delivered him a copy, which written order was a meet order requiring him to meet an opposing superior train at a meeting point on his run, disobeys and disregards his meet order, proceeds up the main line in the territory of the other train almost three miles beyond the ordered meeting point, and there collides with the unoffending opposing train in a dense fog and is killed in the collision resulting from his disobedience of the meet order, can it be held that the employer railroad is liable for his death under the Federal Act on the theory that a proximate cause "in part" of his death was the failure of the dispatcher or operator to have delivered to his conductor at the meeting point extra copies of the same meet order he already had in his possession, or to give him verbal instructions, unauthorized by the rules, to do the same thing he was ordered to do by his written meet order, or the act of the operator at the meeting point in giving him a clear board, which, under the rules, and under all the substantial and credible testimony, simply authorized him to go by the semaphore in order to get into the passing track to obey the written meet order he had?

The most humanly complete answer to this question would seem to be the statement made by the intestate himself, with that frankness and honesty inspired by realization of approaching death, and in a manifest effort to perpetuate the truth as to the disaster which he had caused: "Callie, I met 723 on the main line, and I had a dead meet order with them at Orangeburg, and I got the order and read it—" (R. 147). "I just forgot,—it is too late now, and I am just to blame for it" (R. 148). "I think everybody's killed on both crews. It is all my fault. It is too late" (R. 155).

Theories Upon Which the Court Below Sustained Recovery.

No light is to be found in the opinion of the court below in this case as to the theories upon which the recovery was sustained. It merely referred to the opinion of the same date in the Youngblood case (R. 188); (Youngblood case R. 165).

No new light is thrown on the matter in that opinion since it disposes of the exceptions addressed to the refusal of the trial court to direct judgment for the defendants by merely referring to and quoting from its opinion on the first appeal in the Youngblood case (Youngblood R. 167-170).

No light on this matter is to be found in the opinion of the State Supreme Court on the first appeal of the Dantzler case, 152 S. C. 287, 149 S. E. 750, which merely referred to the opinion of the same date on the second Youngblood appeal, 152 S. C. 265, 149 S. E. 742.

And that opinion throws no light on the matter since it merely referred back to the court's opinion on the first Youngblood appeal, the court saying: "The testimony at the second trial was practically the same as at the first trial, though slightly stronger for the plaintiff. On the first appeal we gave very careful consideration to the questions presented, and held that there was testimony tending to show negligence on the part of defendants, and that, in spite of any contributory negligence on the part of Youngblood, the whole matter should have been submitted to the jury for determination. We see no reason to change the views we then held and this exception is overruled." (152 S. C. 272.)

Consequently, it is necessary to go back to the opinion of the State Supreme Court on the first Youngblood appeal, 137 S. C. 47, 134 S. E. 660, to discover the theories upon which that court affirmed the judgment here sought to be reviewed. That was an appeal in the Youngblood

case by the plaintiff administratrix from a judgment of the trial court in favor of defendants on verdict directed against the plaintiff under the authority of *Davis v. Kennedy*, 266 U. S. 147. The majority of the State Supreme Court reversed this judgment, holding that there was evidence of carrier negligence proximately causing the death of Youngblood sufficient for submission to the jury on the following theories:

1. That it was negligence for the operator at Orangeburg to drop the semaphore board.

2. That there was negligence, either on the part of the Charleston dispatcher or of the Orangeburg operator, in failing to treat the meet order addressed to Extra 723 as a 5-copy order and deliver extra copies thereof to Youngblood on Extra 483 at the meeting point.

3. That it was negligence for the operator at Orangeburg, after dropping the semaphore board, to fail to give additional verbal instructions to Youngblood to the same effect as the written order he already had.

4. That it was negligence to fail to address and deliver the meet order to the opposing superior train, Extra 723, at some point prior to the meeting point.

We have made the pertinent quotation from that opinion in the brief supporting the petition in the Youngblood case (p. 22) and do not repeat it here.

In the Dantzler record there is nowhere any suggestion of a contention predicating railroad negligence on the failure to address and deliver the meet order to the opposing superior train, Extra 723, at some point prior to the meeting point, and, accordingly, this contention is wholly lacking in the present case. It must, therefore, be assumed that the Supreme Court of South Carolina, in affirming the judgment herein, did so on the first three theories above listed.

The dissenting opinions of Judges Cothran and Purdy in the first Youngblood case, 137 S. C. 47, 134 S. E. 660,

constitute a complete brief for petitioners' side of this case. They conclusively demonstrate that there was no evidence of any carrier negligence causally related to the death on any or all of the theories of the majority. The dissents correctly construe and apply the decisions of this Court and other Federal courts, as we read and understand them.

Purdy, J., did not sit on the second appeal in the Youngblood case, but Cothran, J., dissented again on the ground that the evidence entitled the defendants to a directed verdict. He discussed and applied later decisions of this Court, especially emphasizing *Unadilla Valley R. Co. v. Caldine,* 278 U. S. 139. We have quoted from this dissent in our brief in support of the petition in the Youngblood case (p. 24), which quotation we do not here repeat. See 152 S. C. 265, 280, and 152 S. C. 287, 295.

In view of the above, we are forced to discuss each of the three theories of railroad negligence upon which the State Supreme Court apparently affirmed the judgment in this case below.

The Meaning of Dropping the Semaphore.

There can be no dispute on the record as to Dantzler's own negligence. He received from his conductor, Youngblood, copy of the running and meet order No. 18 at Branchville, and they both read the order. All three, engineer, conductor and fireman, were riding in the cab of the engine, and shortly after the train pulled out from Branchville, in answer to a question from the fireman as to what orders they had, the conductor replied, "We have nothing but run extra to Andrews and meet 723 at Orangeburg" (R. 112). The evidence is uncontradicted that there was nothing on the face of the train order in Dantzler's possession indicating that he would be given additional copies of this order, or any other order, at Orangeburg (R. 18, 19, 23, 50, 101, 126, 131, 133, 141).

As this train, Extra 483, proceeding west, approached the semaphore at Orangeburg, the meeting point, the intestate engineer sounded four blasts of the whistle, and in response thereto, the operator at Orangeburg dropped the semaphore board to clear signal. Every witness in the case, plaintiff's witnesses and defendants' witnesses, who was questioned as to the significance of the change of the semaphore to clear signal, with the one exception of plaintiff's witness Huggins, to whose testimony we shall advert in a moment, testified that dropping the semaphore board to clear signal only meant that there were no further train orders at that station for the crew of that train and that they should proceed upon, and comply with, the orders they already had (R. 18, 19, 25, 55, 75, 76, 126, 134-135).

G. K. Fickling, who was not connected with the petitioner railroads, called as a witness for the respondent, testified on direct examination (R. 93):

> "Q. When the four blasts of the whistle were given, and the board drops, and drops from red to white,—what is the indication?
> "A. To proceed.
> "Q. What is the name of that when it is dropped?
> "A. They call it a clear board.
> "Q. That means what?
> "A. *Proceed on the orders that you have.*
> . . . . . .
> "Q. But when the board is dropped, the indication is what?
> "A. *That they have no order for them.*"

And the witness Fickling testified on cross-examination (R. 96):

> "Q. The only way that Extra 483 could have been operated was by train order?
> "A. Yes, sir.
> . . . . . .

"Q. A verbal order would have no effect.

"A. No, sir.

"Q. It makes no difference who would give them, a verbal order itself is not binding?

"A. No, sir, if they had a written train order their duty was to comply with it.

* * * * * * * * *

"Q. When the semaphore board is dropped, that is an indication that the station had no further train order?

"A. Yes, sir.

"Q. *And that the conductor and the engineer should comply with the order that they had.*

"A. *Yes, sir.*"

Respondent's witness Pierce testified (R. 18-19):

"Q. Now, with that order in the possession of Engineer Dantzler, which upon its face shows that he was to meet this Extra train 723 going east at Orangeburg,—when that train approached Orangeburg, and that semaphore showed red, and he stopped and asked for signals, and it was dropped and showed clear,—what does that mean?

"A. That there was no orders for him at Orangeburg.

"Q. And he was to do what?

"A. And that they may proceed on the orders he had, which was to go into the side track and meet extra train No. 723 at Orangeburg. It meant to go into the east end of the pass track at Orangeburg."

Respondent's witness Rogers testified (R. 51-52):

"Q. The order which he had when he approached that train order board, which we have called here the semaphore,—when he cleared him and let the board down,—what was his duty under the circumstances?

"A. To carry out any previous orders that he might have.

"Q. That was his duty?
"A. Yes, sir.
"Q. What was the order that he had?
"A. To meet Extra 723 at Orangeburg.
"Q. What should he have done?
"A. Headed in the east pass track switch and wait until Extra 723 came.
"Q. No matter whether the general copies of the order were given him or not?
"A. No, sir.
"Q. Or a clearance card?
"A. No, sir.
"Q. That was his duty under the circumstances?
"A. Under the order he had, yes.
"Q. When that board went down clearing him, he should have gone into the passing track?
"A. Yes, sir, fulfilling any order that he had in his possession that had not been fulfilled.
"Q. Now, had this order that he had in his possession been fulfilled?
"A. No, sir, it had not,
"Q. Had it been superseded?
"A. No, sir.
"Q. Or annulled?
"A. No, sir.
"Q. Then he should have gone into the passing track under the order that he had?
"A. Yes, sir.
"Q. And waited until Extra 723 came to Orangeburg?
"A. That is correct. That was his duty.
"Q. And under all of the circumstances?
"A. Yes, sir."

The same witness testified (R. 53):

"Q. In running by that meeting point two or three miles west of Orangeburg, and running into the other train known as No. 723,—was that or not in direct violation of the order that they had?
"A. Yes, sir, it was."

Respondent's witness Tyson testified (R. 69):

"Q. Now, by dropping the semaphore board you were lapping No. 483 beyond his territory and into the territory of Extra 723?

"A. The 483 had orders to go in the east end of the pass track and it was necessary to go beyond my station to get into the pass track."

Again, the same witness testified (R. 72):

"Q. When you dropped it, it was to proceed?

"A. Yes, sir.

"Q. Where?

"A. To proceed on the orders that he had.

"Q. What orders did he have?

"A. He had orders to meet Extra 723.

"Q. When he passed your office, where were you at that time, and after you dropped the board,—where did you assume that he went?

"A. I thought he went in the pass track and on up in the yard toward the other end."

Again, the same witness testified (R. 75-76):

"Q. And when this Extra No. 483, under the yard limit rule, when it passed your station and went by Orangeburg, and failed to go into the pass track, it violated the rules of your company?

"A. Yes, sir.

"Q. And every rule?

"A. Yes, sir, they did.

"Q. So you say that when that semaphore board drops it means for the train to proceed?

"A. Yes, sir.

"Q. It means also that you have no orders or further orders for them?

"A. It means that I have no further orders when I pull the board down.

"Q. And you having no further orders for them when they passed, what was their duty?

"A. To carry out the orders that they had in their possession already.

"Q. And that was to go into the pass track and let Extra 723 go by?

"A. Yes, sir."

The foregoing quotations are all from respondent's witnesses. Petitioners' witnesses testified to the same effect. (R. 126, 134, 141.)

One witness for respondent, Huggins, undertook to give testimony in conflict with all the other evidence. He testified that he had worked as a locomotive engineer in main line service for the Southern Railway, the Seaboard Air Line and the Atlantic Coast Line Railroad Company, but that for the past eighteen years he had not been employed by a railroad company. Yet he undertook to testify as an expert on petitioners' rules. His manner and demeanor on the witness stand is apparent from the mere reading of his testimony. He was argumentative and contentious and was manifestly astute to try to shield the intestate engineer from blame and to fix blame on the petitioners. He undertook to testify (R. 81) that when the operator dropped the board it meant to clear Extra 483 to the next telegraph station, that dropping the board cleared them to pass the meeting point. He undertook to testify that this was true irrespective of the meet order (R. 87).

This testimony is so in conflict with all of the other testimony of respondent, is so clearly in conflict with the rules in evidence, and is so incredible on its face, as not to rise to the rank of substantial testimony. It is clearly insufficient to warrant submitting the case to the jury. Even this witness testified (R. 80):

"Q. When a train gets a meet order, what is their duty in approaching a station where they are to meet another train?

"A. If a signal board is there?

"Q. Yes?

"A. He makes four blasts of the whistle to know whether that board is going to remain red on him, *or*

whether they have not got anything, and if they have anything for him it is held red, *and if not he clears him.*"

It is to be observed that in the Youngblood case the same witness swore that dropping the semaphore meant, "I have no further orders for you; proceed on the order you have," just as all the other witnesses testified in both cases (Youngblood R. 71).

We submit that there is no substance of conflict on the record that this was true. The dropping of the semaphore told Dantzler there were no further orders for him at the meeting point, that he should proceed under the order he had, and merely cleared him to pass the semaphore for the sole purpose of going into the passing track to obey that order, the passing track being the only place at which he could obey the meet order.

Engineer Dantzler was an experienced railroad man, having been in the employ of petitioners as a locomotive engineer for many years (R. 6, 124), and he knew that dropping the semaphore board meant only that the operator at Orangeburg had no train orders for him, and he knew that he had to pass that semaphore and proceed 75 yards west of it in order to reach the entrance to the passing track at Orangeburg and fulfill the meet order in his possession. He knew, as testified to by all the witnesses, that extra trains are run only by train orders (R. 12, 17, 48, 101, 125, 133, 141-142), and that "train orders once in effect continue so until fulfilled, superseded or annulled" (Rule 220, R. 179). He knew that a train order could not be superseded or annulled except by a subsequent train order in writing (R. 133), and when he got the semaphore signal that the Orangeburg operator had no train orders for him, he therefore knew that the written meet order in his pocket had not been superseded or annulled. He knew better than anybody else that he had not met and passed Extra 723, and hence his meet order could not have been

fulfilled. He knew that his train, being westbound, was in the inferior time-table direction (R. 20, 21, 52, 53, 74, 126, 173-174), and hence his train was required to take the siding at the meeting point (Rule 88, R. 175).

Also he knew that, for the purpose of carrying out his meet order with the opposing superior train, he had a right, under rule No. 513 (R. 182), to disregard even the red board or stop signal of this semaphore and proceed past it under control to the entrance switch of the passing track. And when Engineer Dantzler, after passing the semaphore at Orangeburg, failed to drive his engine in the passing track and there await the arrival of Extra 723, but proceeded on the main line through the station yard and beyond Orangeburg, the meeting point, he violated the only train order he had, and the only order that had been issued, governing the operation of his train.

There is no support in the evidence for the theory that it was competent for the jury to find that dropping the semaphore meant to Engineer Dantzler that his written order was cancelled or fulfilled, or that he was at liberty to disregard it and proceed to destination. All the substantial evidence shows it meant to proceed under the written meet order he had.

The Treating of the Order Addressed to Extra 723 as a 3-Copy, Instead of a 5-Copy, Order.

But the principal contention of respondent to support recovery, and the contention to which the state court majority seems to have given most weight in the opinion on the first Youngblood appeal, 137 S. C. 47, 134 S. E. 660, is that if the meet order as addressed to Extra 723 at the meeting point had been treated as a 5-copy order, copies thereof being delivered to Dantzler's conductor at Orangeburg, this might have prevented his violation of the same order which was delivered to him at Branchville, and that

the failure to do so was a negligent proximate cause of his death.

The evidence in the case shows that under the pertinent rules of the company the order, being addressed to the train "and operator" should have been transcribed by the operator at Orangeburg as a 5-copy order, that accordingly additional copies should have been delivered to the first of the two trains to reach the meeting point, which was intestate's train, Extra 483. However, even if the failure to do this was negligence, the evidence is likewise undisputed, as we have already shown, that the order which was delivered to Dantzler and to Youngblood at Branchville did not show that they were to get additional orders or further copies of the same order at Orangeburg. They were not expecting such additional copies and hence their failure to get such copies could have had no causal relation to their failure to obey the order they already had.

Observe that if they had received the additional copies at the meeting point they would only have received extra copies of the same order already in their possession and under which Dantzler knew he was running and was obliged to meet Extra 723 at Orangeburg.

The failure to receive the extra copies at Orangeburg which were not expected by him, could not have been a cause of Engineer Dantzler's disobeying the order which he had. The most that can be said is that if he had received such extra copies they might have furnished him an additional motive for obeying the order which he was already obliged to obey.

Thus the recovery here rests upon the theory that the failure of petitioners to give again to the intestate copies of the meet order which he already had, and their failure thereby to prevent him from violating an order which he was already bound to obey was a negligent proximate cause of his disobedience of the order and of his resulting death.

What this Court said of such a theory in *Unadilla Valley R. Co. v. Caldine,* 278 U. S. 139, is here directly applicable:

> "Still considering the case as between the petitioner and Caldine, it seems to us even less possible to say that the collision resulted in part from the failure to inform Caldine of the telephone from train No. 15. A failure to stop a man from doing what he knows he ought not to do hardly can be called a cause of his act. Caldine had a plain duty, and he knew it. The message would only have given him another motive for obeying the rule that he was bound to obey."

So here, the doing of that the failure to do which is the negligence charged to support this recovery, *i. e.,* the giving to Dantzler of additional copies at the meeting point of the meet order which he already had, would have furnished him no additional information or instruction, would only have given him an additional motive for obeying the meet order that he was already bound to obey. The failure of petitioners to stop him from doing what he knew he ought not to do cannot be called a proximate cause of his act of disobedience, or of his resulting death. It seems a clear perversion of the Act to say that when the employer has given the employee a proper and positive order, upon obedience to which his life and the lives of others depend, that the employer can be visited with responsibility, as for negligence, for his death resulting directly from his disobedience of the order, simply because the employer did not give him the same order again. That is to extend the employer's liability to that of an insurer or guarantor.

On this point, the dissenting Justice, Cothran, well said on the first Youngblood appeal, 137 S. C. 47, 134 S. E. 660:

> "It is impossible that the failure of 483 to receive the duplicate copies of the order, if the order had been properly transmitted as a 31-5-copy order and

not as a 31-3-copy order, at Orangeburg, could have induced them to think that the order had been superseded or annulled. If these copies had been delivered to them they would not have had any more information than they already possessed from the orders which both conductor and engineer had received in Branchville and had in their pockets."

Failure of the Orangeburg Operator to Give Additional Verbal Instructions to the Same Effect as the Standing Written Order.

When intestate's engine, Extra 483, arrived at Orangeburg, the operator there reported its arrival by telephone to the dispatcher at Charleston. The dispatcher at Charleston testified that he told the Orangeburg operator over the telephone "to clear him and tell him to go to the west end of the pass track and wait on Extra 723" (R. 44).

The Orangeburg operator got this message, but understood it, in the form "clear him and let him go to the west end of the pass track." He understood this to mean go into the east end of the pass track and move up the pass track to the west end. And he testified that he did not deliver such verbal message to the train crew of Extra 483 because the Charleston dispatcher did not tell him to tell them anything (R. 64-65). To him the verbal message meant the same thing as, clear him, that is, drop the board, and let him obey his meet order.

It is undisputed on the record that there is no such thing as a verbal train order (R. 95, 96, 133) and that train orders must be in writing and that a written train order once in effect continues so until fulfilled, superseded or annulled by another written order (R. 133-134).

In so far as such verbal instructions, had they been given, would have told Conductor Youngblood and Engineer Dantzler to wait in the pass track for Extra 723,

they would merely have been a verbal repetition of the written meet order they already had. And, as to that, what we have said above with reference to failure to give additional copies of the order applies fully. Such verbal message would only have given the deceased an additional motive for obeying the written order he was already bound to obey. The failure to give such added motive cannot be the cause of his disobedience.

Besides, it would have been a bad and dangerous practice to attempt to give the verbal instructions suggested by the Charleston dispatcher. The record shows clearly that the verbal instructions as suggested by the Charleston dispatcher were ambiguous as to whether they meant to tell Dantzler's train to go in the east end of the passing track and up the passing track to the west end, or whether they meant to tell it to proceed up the main line to the west end of the passing track. The passing track was nearly a mile long (R. 72). To have given this ambiguous verbal instruction might have led Dantzler to proceed up the main line to the west end of the passing track, or practically a mile in the territory of the superior train, whereas the written meet order clearly limited Dantzler to entering the nearest or east end of the passing track.

Not only did the failure to give the ambiguous verbal instructions have no causal connection with the collision which occurred, but if they had been given and the collision had occurred on the main line between the east and the west ends of the passing track, the very giving of those verbal instructions would have been charged as railroad negligence.

Judge Cothran, in his dissent in the first Youngblood appeal, 137 S. C. 53, 70, made an unanswerable comment on this theory of employer negligence, saying, with reference to the omitted verbal instructions:

"Clearly this was an order, if it could be so considered, which the Train Dispatcher ran great risk in giving. Train 723 had the superior right of way from the west switch to the east switch of the passing track and that message required Youngblood to overlap the territory of 723 to that extent. If the collision had occurred between the two switches, much would have been made and, properly, of the indiscretion in such an order. Tyson would have been entirely justified in refusing to deliver it. Tyson cleared him to do what 483 was authorized under the rule to do; pass the semaphore and head into the east switch. How the failure to extend an order which should not have been given, could have caused Youngblood to disobey the meet order, refuse to enter the east switch which rules required him to do, refuse to enter the west switch which he was advised to do, and rush on upon an opposing train, is beyond my comprehension."

The Intestate's Negligent Violation of the Meet Order was the Sole Proximate Cause of His Death. The Recovery Cannot be Sustained Under Federal Decisions.

Even if it be assumed that there was any negligence of petitioners on any one or more of the theories of negligence upon which this recovery is sought to be supported, there is nothing to support a reasonable conclusion of efficient causal relation thereof to the collision and death. The only efficient, proximate cause, the only *causa causans,* was Dantzler's violation of a positive meet order.

This Court said in *Atchison, T. & S. F. R. Co., v. Toops,* 281 U. S. 351, where there was evidence of negligence but none of proximate causation:

"But proof of negligence alone does not entitle the plaintiff to recover under the Federal Employers' Liability Act. The negligence complained of must be the cause of the injury. The jury may not be permitted to speculate as to its cause, and the case must be withdrawn from its consideration unless there is

evidence from which the inference may reasonably be drawn that the injury suffered was caused by the negligent act of the employer." (citing cases.)

We submit that to sustain the verdict here on the theory that if extra copies of the meet order had been given the deceased at Orangeburg, or if the command of the meet order had been verbally repeated to him there, the collision might not have happened, would, as this Court said in the *Toops case, supra,* "remove trial by jury from the realm of probability, based on evidence, to that of surmise and conjecture."

The only thing that caused the collision and death here was the violation of the meet order. The whole theory of the respondent, and of the State Court, is that petitioners should be held liable, not because they did anything to cause the collision, but because they failed to do certain things which it is conjectured might have intervened to stop or effect the natural sequence of causation flowing from the intestate's violation of a positive order. Petitioners have been subjected to liability thus far because they did not prevent the intestate from doing what he had been ordered not to do and knew he should not do.

But such a theory does not square itself with accepted definitions of proximate causation:

> "The proximate cause of an injury is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred." 22 R. C. L. 110, sec. 2.
>
> "The active efficient cause that sets in motion a train of events which brings about a result without the intervention of any force started and working actively from a new and independent source."
>
> "That which originates and sets in motion the dominating agency that necessarily proceeds through other causes as mere instruments or vehicles in a natural line of causation to the result." 22 R. C. L. 111, 112, sec. 2.

"The dominent cause from which the injury follows as a direct and immediate consequence." *Brady v. Oregon Lumber Co.* (Ore.), 243 Pac. 96, 45 A. L. R. 822.

Everything charged against petitioners as negligence was a failure to do something *prior* to the time when Dantzler actively violated his meet order. Nothing so charged intervened after his negligence or was an active, efficient cause. On the contrary, the natural, continuous sequence flowing from his act in passing the meeting point, unbroken by any intervening act of petitioners, led necessarily to collision and death.

We think the decision of this Court in *Unadilla Valley R. Co. v. Caldine,* 278 U. S. 139, above quoted from, is controlling here. There the facts were substantially as follows:

The defendant railroad company, engaged in interstate transportation, operates trains on a single track from Richfield Junction, through Bridgewater and River Forks, to New Berlin, in the State of New York. Printed orders were issued to all employees: "Train No. 2 will pass train No. 15 at Bridgewater Yard", and "Train No. 15 will take turntable siding at Bridgewater to allow train No. 2 to pass." Unless countermanded in writing by the superintendent, these orders were permanent. They were not countermanded. Train No. 2 was a gasoline passenger car of which plaintiff's intestate, Caldine, was conductor, and Dibble was motorman. Train No. 15 was a freight train of which Risley was conductor. They collided head-on a short distance south of Bridgewater Yard, and Caldine was killed. There had grown up a custom by which Risley, the conductor of the freight train, if he was a little late, would telephone that fact from his last station before Bridgewater, and Dawson, the defendant's station agent at Bridgewater, would take this message and orally deliver it to Caldine, thus giving to him

a further warning that he must obey the rule. On this occasion the telephone message was sent, but Dawson omitted to inform Caldine. Dawson asserted that he did tell Dibble, the motorman, but Dibble denied this. At any rate, through somebody's negligence, the customary special notice and warning did not reach Caldine. Nevertheless, the conductor, in violation of printed orders, signaled the gasoline car to proceed, and the motorman, also in violation of them, obeyed the signal and started the car in plain sight of the station agent. The Court of Appeals of New York (246 N. Y. 365, 159 N. E. 172), in affirming the judgment in favor of the plaintiff in the trial court, said:

> "The conductor's negligence cannot be viewed as the sole proximate cause of the collision. The station agent could and should have prevented it; so could the motorman. All three were negligent. If Caldine had not signaled in violation of orders, the collision would not have occurred. Neither would it have happened if Dawson had communicated Risley's message to Caldine * * * Dawson knew that the freight was approaching; Dibble ought to have known it and should have kept his car stationary. Negligence was not solely Caldine's. His death resulted in part from the negligence of Dawson and Dibble."

This Court, in reversing the judgment of the New York Court of Appeals, said, pages 141-142:

> "The phrase of the statute, 'resulting in whole or in part,' admits of some latitude of interpretation and is likely to be given somewhat different meanings by different readers. Certainly the relation between the parties is to be taken into account. It seems to us that Caldine, or one who stands in his shoes, is not entitled as against the railroad company that employed him to say that the collision was due to anyone but himself. He was in command. He expected to be obeyed, and he was obeyed as mechani-

cally as if his pulling the bell had itself started the train. In our opinion he cannot be heard to say that his surbordinate ought not to have done what he ordered. He cannot hold the company liable for a disaster that followed disobedience of a rule intended to prevent it, when the disobedience was brought about by his own acts. See *Davis v. Kennedy,* 266 U. S. 147, 69 L. ed. 212, 45 Sup. Ct. Rep. 33.

"Still considering the case as between the petitioner and Caldine, it seems to us *even less possible to say that the collision resulted in part from the failure to inform Caldine of the telephone from Train No. 15. A failure to stop a man from doing what he knows that he ought not to do hardly can be called a cause of his act. Caldine had a plain duty, and he knew it. The message would only have given him another motive for obeying the rule that he was bound to obey.*" (Italics added.)

In comparing the facts of the *Caldine Case* with those of the present case, we submit there is no substantial distinction. An additional copy of the meet order delivered to Dantzler at Orangeburg or an additional verbal order to the same effect would only have given him another motive for obeying his train order, which he was already bound to obey at his peril.

The case of *Unadilla Valley Ry. Co. v. Dibble,* 31 F. (2d) 239, certiorari denied thereto, 280 U. S. 565, related to the same accident as that in the *Caldine Case, supra.* Dibble, the engineer, brought suit for damages on account of injuries received in the same collision in which Caldine, the conductor, was killed. The Circuit Court of Appeals of the Second Circuit, held that the engineer was not entitled to recover damages, and after quoting from the decision in the *Caldine Case,* the opinion continues, page 240:

"Now, between Dibble and the railway, Dibble is in the same position as Caldine. There was a rule made for the protection of each, and each violated it; Cal-

dine by his order, Dibble by his act. While it did not lie in Caldine's mouth, when he deliverately disobeyed the rule, to say that the accident was due to Dibble, it equally did not lie in Dibble's mouth, under identical circumstances, to say that the accident was primarily due to the neglect of Caldine. As against the railway, each was primarily responsible for the injury which befell him."

The case of *Great Northern Railway Co. v. Wiles*, 240 U. S. 444, 448, was an action for damages for the death of a brakeman, suit being brought under the Federal Employers' Liability Act. Wiles was a rear brakeman on a freight train, which came to a stop after passing a curve by reason of the breaking in two of a drawbar in one of the cars of the train. The freight train was followed shortly by a passenger train. The night was dark and the place of collision was obstructed by a sharp curve and a bluff, so that the rear end of the freight train could not be seen for more than five car lengths away. It was the duty of Wiles, under the rules of the railroad company, to go back and flag the following train. This he failed to do, but remained in the caboose, and was killed in the ensuing rear-end collision. In reversing the judgment for the plaintiff, this Court said:

"There is no justification for a comparison of negligences or the apportioning of their effect. The pulling out of the drawbar produced a condition which demanded an instant performance of duty by Wiles,—a duty not only to himself, but to others. The rules of the company were devised for such condition and provided for its emergency. Wiles knew them, and he was prompted to the performance of the duty they enjoined (the circumstances would seem to have needed no prompting) by signals from the engineer when the train stopped. He disregarded both. His fate gives pause to blame, but we cannot help pointing out that the tragedy of the collision might have been appalling. He brought death to himself and to

the conductor of his train. His neglect might have extended the catastrophe to the destruction of passengers in the colliding train. How impressive his duty was is manifest. To excuse its neglect in any way would cast immeasurable liability upon the railroads, and, what is of greater concern, remove security from the lives of those who travel upon them; and therefore all who are concerned with their operation, however high or low in function, should have a full and an anxious sense of responsibility.

"In the present case there was nothing to extenuate Wiles's negligence; there was nothing to confuse his judgment or cause hesitation. His duty was as clear as its performance was easy. He knew the danger of the situation and that it was imminent; to avert it he had only to descend from his train, run back a short distance, and give the signals that the rules directed."

Applying the reasoning in this decision to the facts in the case at bar, there was nothing to extenuate Engineer Dantzler's negligence. He knew the requirements and directions of the written order in his possession, and he knew the rule which provided that the inferior train must take the siding at the meeting point, and after he was cleared by the semaphore all that he had to do to fulfill his meet order and avert the collision was to head in the east switch of the passing track, or back in at the west end, and await the arrival of Extra 723. Certainly, as was said in the *Wiles Case,* "his duty was as clear as its performance was easy." And in the instant case the tragedy of the collision was truly "appalling", for Engineer Dantzler and the conductor of his train, in failing to obey their meet order, brought death not only to themselves, but also to three members of the unoffending crew of the opposing train,—the conductor, engineer and fireman.

In the case of *Virginian Railway Co. v. Linkous,* 230 Fed. 88, reaffirmed on rehearing, 235 Fed. 49; certiorari

thereto denied, 242 U. S. 630, the intestate was engineer of train 468 moving east, and was killed in a head-on collision with another train 33, moving west. He and his conductor had received a meet order for train 33 at a certain point. Three other employees, including the conductor, were riding in the cab of the engine, and all had notice of the meet order, copies of which were found upon their persons after the collision. Train 468, of which Linkous was engineer, ran by the meeting point without heeding the meet order, and collided with train 33 a short distance east of the meeting point. The plaintiff contended that the collision was not solely the result of the negligence of the engineer, but was "in part" due to the negligence of the other employees who were riding on the engine and had notice of the meet order. The Court denied the contention, holding that the engineer was directly responsible for the collision, and that the plaintiff could not come within the provisions of the Federal Employers' Liability Act by relying upon the alleged negligence of the companions of the engineer.

In *Frese v. Chicago, B. & Q. R. Co.*, 263 U. S. 1, 3, the intestate was the engineer of a train which collided with another at a grade crossing of the two railroads. Both trains stopped in compliance with a State statute, but did not discover each other and pulled ahead and collided, killing Frese. Frese's view of the other track was obstructed intermittently until the crossing was reached, and his administratrix contended that she was entitled to recover under the Federal Employers' Liability Act upon the ground that there was evidence of negligence on the part of the fireman, who was sitting on the side toward the other approaching train, in not discovering the presence of the other train and warning the engineer; and that, even if Frese was negligent, such negligence would not completely bar a recovery. In denying a recovery on behalf of the engineer, this Court held that there was no evidence of negligence on the part of the fireman, and,

if there had been, the result would have been the same, saying:

> "Moreover, the statute makes it the personal duty of the engineer positively to ascertain that the train can safely resume its course. Whatever may have been the practice, he could not escape this duty, and it would be a perversion of the Employers' Liability Act * * * to hold that he could recover for an injury primarily due to his failure to act as required, on the ground that possibly the injury might have been prevented if his subordinate had done more."

Manifestly the word "subordinate", used in this last sentence, is merely a term of identification. The meaning would have been no different if the word "fireman" had been used. If the conductor had been the engineer's companion, the rule would have been the same as in the *Linkous Case,* although not a subordinate.

A very exhaustive and clear opinion on the negligence of a railroad employee holding it to be his sole negligence where a collision occurred by reason of the violation of a train order, is that in *Davis v. Payne,* 108 Ore. 72, 216 Pac. 185; certiorari thereto denied, 263 U. S. 720. In that case it was alleged, as grounds for recovery, that the conductor and fireman of Davis's train also had copies of the order, the violation of which caused the collision, and that the conductor, when at Carvallis, negligently gave Davis instructions to proceed; that the conductor at any time could have stopped Davis by turning on the air in the caboose; that the order should have read "Cook to Oswego" instead of "Beaverton to Oswego"; and that the order should have been given to the plaintiff at Oswego instead of at Portland, the starting point. Also, that a "meet order" should have been given, requiring No. 231 to be held at Oswego until No. 234 arrived there. These, in substance, were the various allegations of negligence in the complaint. The action was tried under the Federal Employers' Liability Act.

The answer denied any negligence, and affirmatively alleged that the plaintiff's injury was caused solely by his own negligence in disregarding and refusing to obey the written order above referred to, which was: "No. 234, engine 2911, has right over No. 231, Beaverton to Oswego." The trial resulted in a verdict of $25,000.00, and judgment thereon, from which an appeal was taken to the Supreme Court of the State of Oregon. This judgment was reversed and a judgment ordered in favor of the defendant, the Court saying in its opinion:

> "The plaintiff was charged with the primary responsibility of moving the train, and it was his hand alone that moved the train from Oswego to the place of the wreck. In doing this he violated train order No. 226 and rules No. 83(b) and No. 906. He had no right to leave Oswego until he received a memorandum from the conductor, and it was his own act, and his act alone, which produced the injury he complains of * * * He brought about the death of the engineer on train No. 234 who was rightfully proceeding from Cook to Oswego, and who was acting in strict conformity to train order No. 226. To hold that Congress intended by the Federal Employers' Liability Act, under the circumstances disclosed in this case, to penalize the carrier, and to reward the disobedient employee with a judgment against the carrier for $25,000.00, is unthinkable, and until such a construction is placed upon that Act by the Federal Courts, this Court ought not to uphold this judgment * * *
>
> "Plaintiff having been notified that train No. 234 had a superior right over his train, between the stations of Oswego and Cook, it was his duty to remain at Oswego until the arrival of the superior train, and the carrier was under no obligation to repeat the order at Oswego, or to inform him when the superior train left Cook."

It was contended by the plaintiff in that case that the operator at Oswego was negligent in giving Davis a clear signal. (The respondent in the case at bar seems to rely

upon the identical contention.) In answering that contention, the Oregon Supreme Court said:

> "This contention has no merit. The dropping of the bar by the dispatcher could give him no right to proceed contrary to orders previously received. The only effect of this signal was to inform him that the dispatcher at Oswego had no order in his hands for the conductor and engineer of the train. The signal given by the operator did not supersede, or in any way change or modify the effect of, the order previously given * * * The order previously given could only be revoked by a subsequent order, and when the operator signaled that he had no order for train No. 231, plaintiff knew that the previous order had not been revoked, countermanded, or superseded."

In the case at bar, it likewise was the personal duty of the engineer, Dantzler, positively to ascertain whether he had fulfilled his meet order by passing the other train and it was his positive duty to obey the meet order. He was, jointly with the conductor, charged with the safe movement of the train and the observation of the rules (Rules 105 and 1137, R. 177, and 184), and they were jointly charged with the primary duty of fulfilling the meet order in their possession.

In the case of *Yadkin Railroad Co. v. Sigmon,* 267 U. S. 577, as appears from the decision of the Supreme Court of North Carolina (186 N. C. 519, 120 S. E. 56), the administratrix had recovered damages for the death of an engineer in a head-on collision occurring after his train had passed a station without observing a meet order. It was held by the state court that, although the decedent engineer was negligent in failing to obey the meet order, it was also the duty of the conductor and flagman, when they found the engineer had gone contrary to orders, to signal the train to stop. Both the conductor and the flagman apparently forgot the order, and did not so signal the engineer. Instead of thus reminding the engineer of

his obligation, the flagman pulled the signal cord giving the engineer the signal to go ahead, and the conductor, although apparently observing him do so, did not interfere. The Supreme Court of North Carolina held that their negligence was a contributory cause of the death of the engineer, and that the jury was therefore empowered, under the Federal Employers' Liability Act, to apportion the recovery according to the ratio which they found should exist between the causal effect of the contributory negligence of the engineer and that of the defendant railroad company in the conduct of its conductor and flagman. This Court reversed this decision and remanded the cause for further proceedings, upon the authority of *Davis v. Kennedy*, and *Frese v. Chicago, B. & Q. R. Co.*, *supra*.

In *McDonald v. Great Northern R. Co.*, (Minn.) 207 N. W. 194, the engineer, McDonald, was killed in a head-on collision. He and the conductor, McCabe, had both received a meet order. Before the train which they were to meet at a certain station had arrived, the engineer signaled the conductor that he was ready to proceed. The conductor signaled him ahead. Both had forgotten their orders. The plaintiff sought to come within the protection of the Federal Employers' Liability Act by reliance upon the negligence of the conductor in signaling the engineer ahead, as contributory "in part" to the disaster. The plaintiff had a verdict in the trial court, and, upon appeal, the Supreme Court of Minnesota reversed the judgment of the trial court, saying:

> "Both the engineer and conductor had a duty, personal to himself, to see to it that order 56 was not violated. Its violation by McDonald, in the absence of some other intervening and efficient cause, was negligence which continued to the place of collision, and was the producing cause of the accident. The fact that McCabe was also guilty of negligence in his silent permission in allowing the engineer, who was

> the primary wrongdoer, to violate the order, will not permit plaintiff to recover upon the theory that McCabe's negligence was a contributing cause. To so hold would permit the anomaly of an employee violating orders proximately resulting in his own injury to recover *upon the theory that if some other employee had done his duty and prevented the violation the injury would not have occurred.*" (Italics added.)

A case in which the concurring negligence relied on was not that of an associate or subordinate of the plaintiff, but of an employee in another department, is *Southern Railway Co. v. Hylton,* 37 F. (2d) 843, certiorari denied, 281 U. S. 745, wherein the Circuit Court of Appeals of the Sixth Circuit held that the engineer's disobedience of the train dispatcher's order to look out for a steel gang laying rails was the sole efficient cause of the derailment resulting in his death, notwithstanding the negligence of the track gang foreman in failing to send out a warning flag far enough up the track to enable the train under fair control to stop, as required by a rule or by custom.

In a well considered opinion by Circuit Judge Wilbur in the case of *Bradley v. Northwestern Pac. R. Co.,* 44 F. (2d) 683 (C. C. A., 9th Ct.), the Federal decisions were reviewed and a recovery denied for the death of an engineer who failed to obey an order to meet an extra freight at a certain point, notwithstanding the conductor failed to give warning by whistle as required by the rules of the railroad company.

In the case of *Paster v. Pennsylvania R. Co.,* 43 F. (2d) 908, the Circuit Court of Appeals for the Second Circuit reversed a judgment in favor of a car repairer who was injured while violating the rule requiring him to place blue flags. It held, under authority of the recent decisions of this Court, that the disregard by the servant of specific orders or standing rules, promulgated for his own safety, will bar his recovery although the injury was due also to the fault of other servants.

In our present case it will be recalled that there is no allegation or contention of employer negligence based on negligence attributed to the conductor of intestate's train, or to any other member of its crew, or to any member of the crew of the train collided with.

There is no logical escape from the conclusion that the decedent engineer's death was directly and proximately due to the running of his train beyond Orangeburg, the meeting point, in violation of train order No. 18 which he received at Branchville, and that there was no negligence on the part of the crew of the other train in the collision. It seems to us clear that it would be a perversion of the statute to allow his representative to recover upon the theory that if other employees had done their full duty they might possibly have prevented Dantzler from violating his train order. The order in Engineer Dantzler's possession, and under which he had run his train from Branchville to Orangeburg, contained all the information that he would have had from getting a copy of the order at Orangeburg, and from a further direction from the operator there to take the side-track—directions purely cumulative—disclosing nothing more than he already knew, and in no way changing or superseding his order. The operator at Orangeburg cleared Engineer Dantzler by the semaphore to do what he was authorized and required to do under the terms of his train order, and when he passed this semaphore and failed to run his engine in the east end of the passing track, declined the fireman's suggestion to back in at the west end, but proceeded on the main line through the station yard and beyond, he set in motion the instrument of death, and from that moment to the time of the collision resulting in his death there was no intervening negligent act on the part of any of the "officers, agents, or employees" of the petitioners that contributed in any degree to the accident. The negligence of the intestate engineer continued from the inception of his violation of his meet order up to the

moment of the fatal collision, and was unbroken and uninfluenced by any act or neglect of petitioners.

Whether Dantzler's disregard of his train order was intentional or attributable to mental aberration, and whether such reminder and additional motive would have prevented him from violating his order, can only be surmised and at best are matters of guesswork. The inescapable fact remains that he himself did violate the plain terms of his positive meet order, and received his fatal injuries as the direct result of that violation.

POINT II.

THE ENTIRE EVIDENCE HEREIN SHOWS THAT THE INTESTATE VOLUNTARILY EXPOSED HIMSELF TO RISKS AND DANGERS SO OPEN AND OBVIOUS THAT NO ORDINARILY PRUDENT MAN WOULD HAVE CONTINUED TO FACE THEM, AND HE ASSUMED THE RISK OF HIS DEATH.

There is no charge made in this case that petitioners violated any Act of Congress enacted for the safety of employees (45 U. S. C. 54). Hence the defense of assumption of risk remains in full force as at common law.

Missouri P. R. Co. v. David, No. 365, October Term, 1931, decided Feb. 15, 1932;
Toledo, St. L. & W. R. Co. v. Allen, 276 U. S. 165;
Atlantic C. L. R. Co. v. Southwell, 275 U. S. 64;
St. L. S. F. R. Co. v. Mills, 271 U. S. 344;
Chesapeake & Ohio R. Co. v. Nixon, 271 U. S. 218;
Boldt v. Pennsylvania R. Co., 245 U. S. 441;
Seaboard A. L. Ry. v. Horton, 233 U. S. 492.

As applied to actions under the Federal Employers' Liability Act, it is held that the employee assumes all the ordinary risks and hazards of his occupation, whether appreciated by him or not, and likewise assumes extraor-

dinary risks and hazards known to and appreciated by him, even though caused by the master's negligence.

Chi., R. I. & P. Ry. Co. v. Ward, 252 U. S. 18

We appreciate that a distinction has always been drawn in general between assumption of risk and contributory negligence under the statute.

Pryor v. Williams, 254 U. S. 43;
Chesapeake & O. R. Co. v. De Atley, 241 U. S. 310;
Seaboard A. L. R. Co. v. Horton, 233 U. S. 492.

This Court stated the distinction thus in the *Horton Case, supra:*

> "The distinction, although simple, is sometimes overlooked. Contributory negligence involves the notion of some fault or breach of duty on the part of the employee, and since it is ordinarily his duty to take some precaution for his own safety when engaged in a hazardous occupation, contributory negligence is sometimes defined as a failure to use such care for his safety as ordinarily prudent employees in similar circumstances would use. On the other hand, the assumption of risk, even though the risk be obvious, may be free from any suggestion of fault or negligence on the part of the employees."

However, this Court did not say that assumption of obvious risks *must* be free from the suggestion of fault or negligence on the part of the employee, or that the defense of assumption of risk cannot exist if negligence of the employee contributed to the risk.

If that were the necessary implication of the distinction it would put a premium on the negligence of the employee, since an employee would be barred of recovery as having assumed even unusual and extraordinary risks if known to him, provided no negligence of his own helped create the risks; but, if the very same kind of risks were contributed to by his own positive negligence, he would not

be barred but would be entitled to a comparison of negligences.

We submit that the distinction becomes tenuous to the point of substantial non-existence when the risks and hazards of the work immediately engaged in, whether caused by the negligence of the master alone, or by that of the employee alone, or by the concurrence of both, are not only fully known to and appreciated by the employee but also so open and obvious that no man of ordinary prudence would continue in the face of the danger.

We believe the Court of Appeals of Kentucky suggested the proper solution of the apparent paradox, in *Chesapeake & O. R. Co. v. De Atley,* 159 Ky. 687, 167 S. W. 933, 935, reversed on other grounds, 241 U. S. 310, when it said:

> "Notwithstanding this distinction, it is generally held that assumption of risk and contributory negligence frequently approximate where the danger is so obvious and imminent that no ordinarily prudent man would assume the risk of injury therefrom. Narramore v. Cleveland, etc., R. Co., 96 Fed. 298."

We submit that the risks and dangers of running an inferior train, on a single track railroad, in a dense fog which obscured visibility, in the direction of a superior train known to be approaching from the opposite direction, and known not to expect the inferior train to be where it was, and in clear violation of a positive meet order, were so open and obvious that no man of ordinary prudence would have engaged in such a hazardous enterprise. If Dantzler could conceivably have been engaged in such an undertaking with full knowledge of the risks, but without fault of his own, it seems clear under the decisions that he would have assumed the risks and that his administratrix would have been barred of recovery.

We do not believe the statute intended that the administratrix should be in better position to recover merely

because her intestate's negligent and reckless conduct in disobeying a written meet order produced the very situation of open and obvious danger and peril in which he found himself.

We submit that the judgment below should be reversed on the ground that respondent's intestate assumed the risk of his death, as well as on the ground that the sole proximate cause of his death was his own negligence.

POINT III.

THE SUPREME COURT OF SOUTH CAROLINA MISINTERPRETED THE FEDERAL EMPLOYERS' LIABILITY ACT IN UPHOLDING A RECOVERY OF SUBSTANTIAL DAMAGES IN THE ABSENCE OF PROOF OF WHAT PECUNIARY ASSISTANCE OR SUPPORT THE NAMED BENEFICIARIES MIGHT REASONABLY HAVE EXPECTED TO RECEIVE FROM THE DECEASED EMPLOYEE HAD HE LIVED.

It is the contention of petitioners that, in any view of this case, there was not sufficient evidence on which the jury could base an award of damages, and hence that the State Supreme Court erred in sustaining the trial court's refusal to grant petitioners' motion for a directed verdict on this ground.

In an action under the Federal Employers' Liability Act for death, the damages can only be compensatory, and the measure of them is what the beneficiaries named in the statute necessarily lose by the death of the deceased employee. Unless the plaintiff shows that the qualified beneficiaries have been deprived of a reasonable expectation of pecuniary benefits by the wrongful death of the injured employee, there can be no recovery.

In the case of *Michigan Central R. Co. v. Vreeland*, 227 U. S. 59, 70, it was held that only the pecuniary loss or

damage is allowable, and that loss is not dependent upon any legal liability of the injured person to the beneficiaries. That may be one, but it is not the sole, test. "There must, however, appear some reasonable expectation of pecuniary assistance or support of which they have been deprived."

In *Gulf, C. & S. F. Ry. Co. v. McGinnis*, 228 U. S. 173, 175, this Court, in overruling the decision of the Texas Court of Civil Appeals, said:

> "The Court of Civil Appeals upheld this ruling, saying that the Federal 'statute expressly authorized the suit to be brought by the personal representative for the benefit of the surviving wife and children of the deceased, irrespective of whether they were dependent upon him, or had the right to expect any pecuniary assistance from him.' 147 S. W. 1189. This construction of the character of the statutory liability imposed by the Act of Congress was erroneous. In a series of cases lately decided by this Court, the Act in this aspect has been construed as intended only to compensate the surviving relatives of such a deceased employee for the *actual pecuniary loss* resulting to the particular person for whose benefit an action is given. The recovery must therefore be limited to compensating those relatives for whose benefit the administrator sues *as are shown* to have sustained some pecuniary loss." (Italics added.)

In the case at bar, the respondent merely testified as to the ages of the intestate and herself and her sixteen year old minor child and as to the amount her intestate was earning at the time of his death. There was not a scintilla of evidence that she or her child were dependent upon him for support. There was no testimony as to the deceased's or as to his widow's expectancy of life, or as to the expectancy of the child, not even the mortuary tables being introduced in evidence. There was no evidence as to the amount of the contributions made to the respondent and the child by the deceased out of his earnings.

The respondent's entire testimony in this regard was as follows (R. 6):

> "He was forty-one years old at the time of his death, and left surviving him myself, as his widow, and one son, John Lawrence Dantzler, who was sixteen years of age. My age at that time was forty-one, the same as my husband. My husband was working regularly for the Southern Railway Company, and the condition of his physical health was good. During our married life he never lost any time on account of sickness."

> "Q. Mrs. Dantzler, what wages did he draw as locomotive engineer for the railroad?
> A. You mean by the year?
> "Q. Well, have you any memorandum with you of his income tax return?
> A. Yes, sir.
> "Q. That is for the year 1923?
> A. Yes, sir, the year before his death.
> "Q. That shows that the amount paid him for the year 1923 was $2,650.22?
> A. Yes, sir.
> "Q. That is correct, isn't it?
> A. Yes, sir, that is a copy of his return."

The damages, if any, recoverable in this action are necessarily based entirely upon the deprivation of future pecuniary benefits which the respondent and her child might have received from the intestate had he lived and there was an utter absence of proof that the deceased engineer contributed any amount out of his wages to the beneficiaries for their support, or that they had a reasonable expectation of pecuniary benefits from a continuation of his life, and there was no evidence from which the jury could estimate any monetary loss to the beneficiaries by reason of the death.

The jury were left to make a complicated calculation involving the life expectancy of the deceased, the life ex-

pectancy of the beneficiaries, the usual contributions made by the deceased to the beneficiaries out of his earnings, and the reduction of the reasonably expected contributions for the periods of life expectancy to a present value, when all the elements necessarily entering into the computation were entirely missing except the bare fact as to the amount of money earned by the deceased the last year of his life.

In the case of *Nashville, C. & St. L. R. Co. v. Anderson*, 134 Tenn. 666, 185 S. W. 677, an action under the Federal Employers' Liability Act, the deceased employee left a widow and infant child. We quote from the opinion of the Tennessee Supreme Court as follows:

> "The pecuniary loss of these beneficiaries was not what the deceased might have earned, but what part of his earnings they might reasonably have expected to receive.
>
> "Further, it seems very clear from a study of the decisions of the Supreme Court of the United States * * * that there must be evidence of pecuniary damage before such damage can be allowed. This rule is enforced with more strictness by the Supreme Court of the United States, perhaps, than by some of the State courts in jurisdictions where acts fashioned after Lord Campbell's Act prevail.
>
> "In this case deceased's age, expectancy, and earning capacity were proven. *It was also proven that his wife and child were dependent upon him for support. There was no proof, however, as to the value of his customary contributions to the support of these beneficiaries, and nothing to indicate what such beneficiaries might reasonably have expected from him in the way of support.*
>
> "In this case it was only shown that the beneficiaries of this suit had sustained a loss. *There was no proof as to the extent of the loss. There was proof of the earning capacity of the deceased and his expectancy, but there was nothing to show what these beneficiaries might reasonably have expected to receive from the deceased, and under such circum-*

stances, under the rules laid down in the late Supreme Court cases, no recovery for more than nominal damages could stand.

"The elements of damage to be considered by the jury are indicated in the foregoing authorities. *There must be proof to show the reasonable expectation. Under the reasoning of the Supreme Court decisions, the widow's expectancy of life should be taken into account in estimating her loss.*" (Italics added.)

CONCLUSION.

For the reasons assigned in the petition for certiorari, and because of the facts and the law set out in this brief accompanying said petition, we respectfully submit that the writ of certiorari should be granted, and that, after full consideration by this Court, the judgment and decision of the Supreme Court of South Carolina herein should be reversed and judgment be entered in the cause for your petitioners.

Respectfully submitted,

SIDNEY S. ALDERMAN,
H. O'B. COOPER,
FRANK G. TOMPKINS,
J. E. HARLEY,
Attorneys for Petitioners, Southern Railway Company, and Southern Railway-Carolina Division.

S. R. PRINCE,
Of Counsel.